IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARK A. KOCH,

Plaintiff,

vs.

SAMUEL LEWIS, ROGER CRIST, ERNIE SALAZAR, FRED BALLARD, CHUCK GOLDSMITH, LIEUTENANT MARTIN, CMO LAMB, SGT. NAJAB SGT. GAY, et al.,

Defendants.

CIV-90-1872-PHX-ROS (JBM)

MEMORANDUM AND ORDER

Plaintiff Mark Koch, proceeding *pro se*, is presently an inmate in the Arizona Department of Corrections (ADOC) at the ASPC-Florence, Arizona facility. He has been pursuing several routes of litigation against the warden and other officers of Arizona's prison system for more than eight years. Most recently, on March 19, 1998, he filed a motion for an order authorizing him to use a typewriter in the preparation of his legal memoranda, and on February 18, 1988, he filed a motion to reconsider Judge Roslyn Silver's August 5, 1996 order denying his request for injunctive relief and a motion for a judgment declaring that as a prisoner he has a liberty interest in his security-level classification and consequently cannot be moved from one security level to another without a hearing that complies with the procedural requirements of the due process clause. For the reasons stated below, we grant his motion for the use of a typewriter and deny his motion for reconsideration. We stay the court's decision regarding his motion for a declaratory judgment, considered as a motion to amend the complaint, until the government has filed a response.

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BACKGROUND

Koch has been incarcerated with ADOC since, apparently, at least 1984, and has embarked on a seemingly endless stream of litigation. In 1990, he filed a §1983 claim alleging that ADOC officers had violated his civil rights by subjecting him to unlawful searches, placing him in administrative segregation, and generally retaliating against him for the exercise of his civil rights. On November 9, 1993, Judge Carl A. Muecke granted defendants' summary judgment on that claim, but on August 1, 1995, the Ninth Circuit reversed and remanded. Finally, on August 5, 1996, Judge Silver considered the case on remand and denied Koch's motion for a preliminary injunction. Koch had sought the injunction to stop ADOC from transferring him without cause to higher security units than his behavior warranted. ADOC's practice of repeatedly transferring Koch between different facilities and security classifications also serves as the basis for his demand for a declaratory judgment in the present matter.

In addition, Koch, a partial amputee with limited use of his right hand, asserts that ADOC has recently enacted the practice of prohibiting typewriters to inmates unless they have a pending case or court order authorizing the use of one. Under this policy Koch claims that although prisoners who owned their own typewriters at the time the regulation was enacted can retain them -- the machines will not be returned if they need to be sent out for repairs or other maintenance.

ANALYSIS

I. Plaintiff's Motion for a Typewriter

Plaintiff argues that he is entitled to the use of a typewriter in the preparation of his legal memoranda, despite a prison regulation to the contrary, and seeks an order entitling him

to have the machine returned if he must send it out of his cell for maintenance. The defendants assert that in Casey v. Lewis, 43 F.3d 1261 (9th Cir. 1994), the Ninth Circuit ruled that inmates have no right to a typewriter. We note, first, that the issue there was whether ADOC was obligated to provide typewriters and although the district court ruled that it was, that order was ultimately vacated because plaintiffs did not challenge ADOC's objections on appeal. *Id.* at 1271. We note as well that Casey was reversed by the Supreme Court, 518 U.S. 343 (1996), on the grounds that most of the plaintiffs in the case, a class action, had failed to show an actual injury resulting from the alleged lack of access to materials needed for legal research and writing. 518 U.S. at 360. It found, however, that one plaintiff had suffered an actual injury because ADOC had failed to provide him with certain special services he needed in order to accommodate his disability (illiteracy) and thus, although a systemwide remedy was considered inappropriate, the Court found that he was individually entitled to relief. *Id.* That, of course, sounds quite similar to the situation before this court.

Defendants are correct in asserting that prisoners have no constitutional right to the use of a typewriter. *See* Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 857 (9th Cir. 1985); Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978); Wolfish v. Levi, 573 F.2d 118, 132 (2d Cir. 1978), *rev'd on other grounds*, 441 U.S. 520 (1979). However, it is also well established that inmates must have meaningful access to the courts. Bounds v. Smith, 430 U.S. 817, 828 (1977). Plaintiff claims he needs a typewriter because his right hand has been partially amputated and writing is consequently difficult and painful for him. He asserts, however, and defendants do not deny, that it is ADOC's policy to prohibit typewriters to inmates unless they have a pending case or a court order authorizing the use of a typewriter, although an inmate

may keep a typewriter he already possesses (but he will not get it back if it has to go out for repair). There is apparently no exception for prisoners with a disability. Plaintiff has a pending case. He is apparently concerned about what will happen if his typewriter needs repairs, although it appears he would get it back while this case is pending. Aside from the reference to Casey, defendants make no other argument in response to Koch's motion. They do not argue that typewriters pose security problems or otherwise disrupt the correctional environment, nor do they claim that plaintiff's disability is not severe enough to warrant individualized treatment.

In the absence of any further argument from defendants *(see* D.Ariz. L.R. 1.10(e)), we find that Koch's disability should be accommodated in order to ensure he has meaningful access to the courts. He may keep his typewriter and is entitled to its return in the event that it is sent out for repairs.

II. Plaintiff's Motion to Reconsider

Plaintiff also filed a motion to reconsider Judge Silver's August 5, 1996 ruling denying his request for a preliminary injunction. Judge Silver reconsidered her ruling and adhered to it on March 26, 1997, and it appears that the Court of Appeals affirmed on January 6, 1998. We see no reason to revisit the matter. The motion to reconsider is denied.

III. Plaintiff's Motion for Declaratory Judgment

Plaintiff's real concern appears to be that he has been continued in a high security classification. That is what his "new evidence" indicates. He claims that he has been transferred between various prison units in the last several years. He also claims that he has been moved to a higher security level as part of the Security Threat Group (STG) Program in

which prisoners with a history of gang involvement within their correctional facility are moved out of general population and into a higher security unit. Plaintiff argues that these transfers deprive him of due process and that he is entitled to a declaratory judgment stating that he has a liberty interest in his prison population classification (*e.g.* general population, segregation, or higher custody) and is thus entitled to be released from higher custody on the grounds that the prison has failed to show any misconduct or wrongdoing. While he has not sought declaratory relief in his amended complaint, and does not there advance this claim, we are confident he will do so in another litigation if the matter is not resolved here, and, accordingly, we will consider the motion as a motion for leave to amend the complaint.

Generally, the transfer of a prisoner to a higher security level of confinement does not implicate a liberty interest sufficient to trigger the protections of procedural due process. Meachum v. Fano, 427 U.S. 215, 224 (1975). Plaintiff correctly asserts, however, that under certain circumstances the state in which the prisoner is confined may create such a liberty interest. Sandin v. Connor, 515 U.S. 472, 484 (1995). The Supreme Court has recently emphasized that such state-created interests are

> generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force [such as a transfer to a mental hospital or the involuntary administration of psycho tropic drugs] nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. (citations omitted).

Plaintiff argues that Arizona law creates a liberty interest in two ways. First, he claims that in a consent decree entered in Harris, et al. v. Cardwell, CIV-75-185-PHX-CAM the state of Arizona agreed that classification and custody levels were entitlements the change of which

implicate a liberty interest for due process purposes. Judge Silver addressed a very similar argument in the August 5, 1996 order in which she denied plaintiff's motion for summary judgment. Harris was a class action lawsuit where the plaintiff class was defined as those persons "incarcerated in the men's division of the Arizona State Prison in Florence, Arizona, during the pendency of this action," which was between September 29, 1977 and May 26, 1982. As Judge Silver pointed out, Koch does not allege that he is a member of this class and the consent judgment consequently does not apply to him. Thus, it is impossible to see how that order could have created any interest on Koch's behalf.

Koch next argues that the Arizona laws governing the operation of state prisons define the security classification system in a manner that creates a liberty interest in maintaining their current classification. Specifically, he claims that state laws requiring the ADOC to create good-behavior based incentive programs and to base security classifications in part on the inmate's level of misconduct during his period of incarceration, create on behalf of inmates an interest in their classification of which they cannot be deprived in the absence of due process. We disagree for several reasons. First, Koch is unable to point to any law that does in fact state such rules. Second, there is no evidence that a higher security classification imposes a hardship substantially and atypically different from the ordinary incidents of incarceration. In fact, this precise argument has been considered and rejected in Sandefur v. Lewis, where the court found "as a matter of law that no liberty interest exists under Arizona state law by the bare fact of [a prisoner's security level] reclassification." 937 F.Supp. 890, 896-97 (D.Ariz. 1996).

According to Koch, the primary difference between the higher and lower security levels

is that the higher security units limit a prisoner's access to certain programs, more severely restrict physical movement and subject the prisoner to a higher level of security. In other words, Koch is claiming that a high security classification intensifies the degree to which he experiences the typical incidents of incarceration. As the Sandefur court concluded, these characteristics of high-security confinement do not create an environment so unexpected or unlike a typical prison environment so as to require due process, nor are they so "'qualitatively different' from the punishment characteristically suffered by a person convicted of a crime [that they] result in 'stigmatizing consequences.'" Sandin, 515 U.S. at 479, fn. 4. In fact, the conditions Koch describes are precisely "what one could expect from prison life generally" and consequently do not implicate due process. Sandefur, 937 F.Supp. at 896. Many cases have come to a similar conclusion. *See* Sandefur, 937 F.Supp. at 896 (listing cases finding administrative segregation did not implicate procedural due process).

However, it is possible that the duration of an unexplained change in security classification might ultimately affect the analysis. *See, e.g.* Lee v. Coughlin, 902 F.Supp. 424, 431 (S.D.N.Y. 1995) (finding that 376 days of administrative segregation was a significant and atypical hardship). In Sandin, the Supreme Court addressed only a 30-day period of segregation, and the vast majority of the cases addressing this issue have dealt with reclassification periods of well under a year. In this case Koch alleges that he has been reclassified for approximately five years, including two years in segregation and three in higher custody. Because part of his security classification is based on his status as an STG member, we presume that at some point Koch received a due process hearing. However, he is entirely

unclear about the facts and the government has failed to respond to this motion[1]. Accordingly, we refrain from ruling on Koch's motion for a declaratory judgment and order the government to file a response by June 19, 1998, to which Koch may file a reply no later than July 9, 1998. We emphasize that the government's response should include a chronology of Koch's various security classifications, what if any procedure preceded these transfers, the government's position on Koch's argument that he has a liberty interest in his security classification, and how the duration of his increased security classification should affect this analysis.

Finally, we note that plaintiff has filed a motion to compel discovery. This case had previously been referred to Magistrate Judge Virginia A. Mathis for completion of discovery, and that reference remains in place. We would hope that any discovery can be completed within 90 days and this now ancient case can thereafter be set for trial of any issues that may remain.

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[1]Koch admits that his security classification was based in part on the fact that he had been identified as a Security Threat Group (STG) member under an internal prison regulation, Director's Management Order #57 (DMO 57). Before being officially identified as an STG member, prisoners are given notice and a hearing before the STG Member Validation Committee, which determines what inmates are threats to security on the basis of the prisoner's level of involvement in prison gang activity. An inmate will only be classified as an STG member if there are three or more items of evidence documenting his gang involvement. Once he is so classified, the prisoner will be transferred to more secure confinement. Once determined, STG classification is reviewed every 12 months. Judge Silver's August 5, 1996 order discussed this process at great length. Plaintiff does not address the fact that he received a hearing under DMO 57 before being classified as an STG member, or explain why he believes that hearing was insufficient to meet procedural due process.

CONCLUSION

For the reasons stated above, we grant Koch's motion to use a typewriter in the preparation of legal memoranda. His motion for reconsideration, however, is denied and our decision on his motion for a declaratory judgment is temporarily stayed.

James B. Moran

JAMES B. MORAN
Senior Judge, U. S. District Court

May 21, 1998.

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